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No. 82-817

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT EUGENE CARMICHAEL, JR. AND
JOE GRADY FLOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CAROLYN L. GAINES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether evidence that petitioners bought votes to be cast in a combined federal and state primary election is sufficient to prove a violation of 42 U.S.C. 1973i(c).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute involved	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Anderson v. *United States*, 417 U.S. 211	7
Blitz v. *United States*, 153 U.S. 308	6
Coy, In re, 127 U.S. 731	5, 6
McElroy v. *United States*, No. 80-6680 (Mar. 23, 1982)	7
United States v. *Bowman*, 636 F.2d 1003	6, 7
United States v. *Mason*, 673 F.2d 737	4, 6-7
Yarbrough, Ex parte, 110 U.S. 651	5

Constitution and statutes:

United States Constitution, Article I, Section 4	5
18 U.S.C. 241	7
18 U.S.C. 371	2
18 U.S.C. 1503	2
42 U.S.C. 1973i(c)	1, 2, 4, 5, 6, 7, 8

Page

Miscellaneous:

111 Cong. Rec. (1965):

P. 8432 7

PP. 16245-16246 7

P. 16250 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at [illegible]95 F.2d 903.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982. A petition for rehearing was denied on September 16, 1982. The petition for a writ of certiorari was filed on November 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 1973i(c) provides in pertinent part:

Whoever knowingly or willfully * * * pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000

or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiracy to pay for votes in an election held in part to select candidates for federal offices, in violation of 18 U.S.C. 371; 12 counts of paying for votes, in violation of 42 U.S.C. 1973i(c); and one count of obstruction of justice, in violation of 18 U.S.C. 1503. Petitioner Carmichael was sentenced to concurrent terms of five years' imprisonment on the conspiracy and vote buying counts and a consecutive term of five years' imprisonment on the obstruction of justice count. Additionally, he was fined $20,000. Petitioner Flowers was sentenced to concurrent terms of four years' imprisonment on the conspiracy and vote buying counts and a consecutive term of three years' imprisonment for obstruction of justice. The court of appeals affirmed (Pet. App. 1a-17a).

1. The evidence as reflected in the opinion of the court of appeals showed as follows: Petitioner Carmichael was a state senator in South Carolina, representing Dillon, Marlboro, Chesterfield, and Lee Counties, and petitioner Flowers was one of his part-time employees (Pet. App. 2a). During the 1980 primary campaign, Sheriff Roy Lee of Dillon County asked Flowers to work for him in his reelection campaign. Carmichael gave his permission and also contributed financially to Lee's campaign (*id.* at 4a).

In April 1980, Carmichael was placed in charge of absentee balloting in the Lakeview precinct, and he delegated the responsibility to distribute absentee ballot applications to Flowers. They made the absentee ballot applications available at Carmichael's office (Pet. App. 5a).

In April and May 1980, three campaign meetings to re-elect Sheriff Roy Lee were held at petitioner Carmichael's lakehouse. Flowers attended all three meetings and Carmichael attended two (Pet. App. 5a-6a). Large numbers of campaign workers attended these meetings. At the close of the first meeting, petitioner Carmichael told Lee that they needed about 1,700 absentee ballots to win. At the second and third meetings, the campaign workers were told that they would be paid $10 per absentee ballot turned in and that they could pay the voters whatever they wished. Absentee ballot applications were distributed at the meetings, and it was suggested that the voters use vacation or employment outside the county as the reason for applying for the absentee ballot (Pet. App. 6a).

Lee campaign workers distributed absentee ballot applications to voters, had them filled out, and returned them to petitioner Flowers. When the absentee ballots had been received by the voters, the workers returned to help the voters fill out the ballot and then turned the ballots in to petitioner Flowers. When the ballots were turned back in, some of them were sealed as required by state law; however, many were unsealed (Pet. App. 6a).

The June 10, 1980, primary election was held in part to select candidates for the United States Senate and United States House of Representatives. The election results showed that 400 persons in the Lakeview precinct had voted by absentee ballot, which amounted to forty percent of the votes cast in that precinct. Sheriff Lee received the vote in 94% (1,265) of all absentee ballots cast in Dillon County (Pet. App. 7a-8a).

After the government presented its case-in-chief, petitioners moved for judgment of acquittal because "the government has failed to prove that anyone was paid to vote in a federal election," as opposed to an election which only included "a federal race" (C.A. App. 1035).[1] The motion was denied. After the close of the evidence, the United States proposed and the district court instructed, over petitioners' objection (*id.* at 1507), that the government was required to prove "that the election of June 10, 1980, involved in part the selection of candidates for United States Senate or United States House of Representatives" (*id.* at 1670).

2. The court of appeals affirmed (Pet. App. 1a-17a). The court rejected petitioners' argument that 42 U.S.C. 1973i(c) requires proof that the vote buying actually affected an election for federal office. Relying on its earlier decision in a case arising out of the same vote-buying scheme (*United States* v. *Mason*, 673 F.2d 737 (4th Cir. 1982)), the court held that a violation of Section 1973i(c) is established when the evidence shows that a defendant bought or offered to buy a vote and that the activity " 'exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific intent to expose the federal election to such corruption or possibility of corruption' " (Pet. App. 9a). The court found that since the absentee ballots were unsealed and petitioner Flowers helped mark the ballots, there was sufficient potential for corruption of the federal contests on the ballots to violate Section 1973i(c) (Pet. App. 9a-10a).

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[1] "C.A. App." refers to the joint appendix filed with the court of appeals.

ARGUMENT

1. Petitioners contend (Pet. 5-13) that 42 U.S.C. 1973i(c) requires proof that the vote buying had a direct and intended effect on a federal contest, and that since their conduct was directed solely at a local sheriff's race, it did not constitute a violation of federal law. In support of this contention, petitioners argue that Congress' power to regulate elections does not extend to a case such as this where the vote fraud is designed to influence the local contest and that, even if it did, Congress did not intend to proscribe efforts to corrupt local contests in mixed federal-state elections. Neither claim warrants review by this Court.

a. Under Article I, Section 4 of the Constitution, Congress has the power to regulate the manner in which federal elections are conducted, and this power extends to the prevention of fraud and corruption in carrying out those elections. See *Ex parte Yarbrough*, 110 U.S. 651 (1884). "[T]he power * * * of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned." *In re Coy*, 127 U.S. 731, 752 (1888). In *Coy*, the defendant made the identical challenge with respect to a mixed state and federal election that is presently being asserted by petitioners. There it was argued that since the evil intent was not shown to have been specifically aimed votes for federal office, Congress had no power to provide for any punishment. In rejecting the defendant's claim, this Court stated (*id.* at 754):

> The object to be attained by these acts of Congress is to guard against the danger, and the opportunity, of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members

> of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result.

Thus, it is established that Congress has the power to punish conduct that taints the integrity of a federal election, regardless of whether the defendants' immediate concern may be a local contest.[2]

b. Nor is there anything in 42 U.S.C. 1973i(c) that indicates Congress intended to limit prosecutions to cases involving a specific attempt to affect a federal contest. The plain language of the statute proscribes all vote buying in any mixed federal-state election. It does not require that the payment be made on behalf of a federal candidate or that the voter be paid to vote for a federal candidate. *United States* v. *Mason*, 673 F.2d 737, 739 (4th Cir. 1982); *United States* v. *Bowman*, 636 F.2d 1003, 1008 (5th Cir. 1981).

Section 1973i(c) is violated when the proscribed conduct " 'exposes the federal aspects of the election to the possibility of corruption * * *.' " *United States* v. *Mason, supra,*

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[2]Contrary to petitioners' contention, *Blitz* v. *United States*, 153 U.S. 308 (1894), does not require a different result. In *Blitz*, the Court reaffirmed its holding in *Coy* and distinguished it on the basis that one of the two counts on which the defendant was convicted charged only a state offense, because that count did not sufficiently allege any federal nexus required by the particular vote fraud statute at issue in that case. In upholding the conviction on the other count, which alleged an impact on the federal election, the Court made clear that its decision turned on the wording of the offense charged in the indictment.

673 F.2d at 739-740, quoting *United States* v. *Bowman, supra*, 636 F.2d at 1011. The payment for votes is the evil at which the statute is aimed, and it is a practice that inherently corrupts the entire election. 111 Cong. Rec. 16245-16246 (1965) (remarks of Rep. Cramer); *id.* at 16250 (remarks of Rep. Rhodes). It is impossible to isolate a threat to the integrity of the state electoral process from a threat to the integrity of the federal contest in a mixed election. 111 Cong. Rec. 8432 (1965) (remarks of Sen. Williams); *United States* v. *Bowman, supra*, 636 F.2d at 1012.[3] The district court thus instructed the jury properly regarding the jurisdictional element of 42 U.S.C. 1973i(c).[4]

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[3]It is inconceivable that Congress would have imposed on the government the onerous burden of proving actual effect on a federal contest. Cf. *McElroy* v. *United States*, No. 80-6680 (Mar. 23, 1982), slip op. 12-13. As Senator Williams explained in proposing the amendment that served as the basis for 42 U.S.C. 1973i(c), "[i]f national and State officers are listed on the same ballot how could I as a layman prove what vote a man might have been paid $10 for?" 111 Cong. Rec. 8432 (1965).

When called to testify, voters whose ballots have been the subject of fraudulent practices rarely are able to reconstruct the circumstances under which their votes were stolen or purchased from them in sufficient detail to allow them to testify as to the identity of the candidates for whom their votes were cast. Indeed, as the record in this case amply demonstrates, it is common with this type of fraud for a voter never to have seen his ballot. Accordingly, the fraud is likely to have a corrupting effect on federal elections even if that is not its purpose, but the precise effect will be difficult to reconstruct.

[4]This Court's decision in *Anderson* v. *United States*, 417 U.S. 211 (1974), does not cast any doubt on the validity of petitioners' convictions under Section 1973i(c). That case involved the proper interpretation of 18 U.S.C. 241, as applied to an alleged conspiracy to cast fraudulent votes for federal offices. The Court's decision that the evidence in that case was sufficient to establish a violation of Section 241 provides no support for petitioners' contentions here. Indeed, there,

2. Petitioners argue (Pet. 12-13) that the court of appeals, by relying on evidence that ballots were delivered unsealed and that workers marked ballots, affirmed on the basis of a theory not presented to the jury. Although the court of appeals did advert to this evidence, which was irrelevant under the district court's charge to the jury, it is by no means clear from the opinion that it held that such evidence was essential to proof of the offense. Rather, it appears to have been referred to in order to illustrate the corruptive potential inherent in the context of mixed federal-state elections.

In any event, any error in this regard does not warrant review by this Court. There is simply no reason for this Court to take up the issue of the proper interpretation of Section 1973i(c), since there is no conflict in decisions among the courts of appeals regarding its scope, or to review petitioners' convictions, since their conduct clearly violated the statute under any theory of its coverage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

CAROLYN L. GAINES
Attorney

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as here, the primary purpose of the conspirators was to affect a local election (see 417 U.S. at 215) and the scheme inevitably would involve the casting of fraudulent votes for federal as well as state and local offices in order to prevent the fraud from being needlessly conspicuous.

DOJ-1983-01